STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

North County Communications Complainant,	)	
vs.	)	Docket No. 02-0147
Verizon North Inc. and Verizon South Inc. Respondents.	)	

REPLY BRIEF OF
VERIZON NORTH INC. AND VERIZON SOUTH INC.

January 20, 2004

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I. Introduction

North County Communications ("NCC") is required by law to demonstrate the veracity of its claims by a preponderance of the evidence. 5 ILCS 100/10-15. It is clear from NCC's Initial Brief that NCC has completely and utterly failed to carry its burden. NCC's Initial Brief does nothing to rectify the evidentiary infirmities that have plagued NCC's entire case. NCC does not address, even in passing, the substantial evidence[1] that establishes, unequivocally, that Verizon Illinois does not have a policy to require carriers to wait for unnecessary "wholesale fiber build-outs."[2] Rather, NCC seeks to have the Commission ignore virtually the entire evidentiary record and hinge its findings on isolated pieces of the evidence that NCC has taken out of context and entirely misconstrued. Namely, a speculative statement that NCC forced Verizon Illinois witness Ms. Allison to make over Verizon Illinois' objection that administrative law judge ("ALJ") Showtis even stated Verizon Illinois would not be held to, Ms. McKernan's prefatory statement at the beginning of the E-Mail Chain[3] and a letter sent from one of Verizon's in-house attorneys, Mr. Steven Hartmann, regarding NCC's dispute with Verizon Illinois' West Virginia affiliate. NCC's arguments, based on nothing but incorrect interpretations and characterizations, are not designed to lead to the truth of the matter, but rather are intended to confuse and mislead. They cannot overcome the substantial evidence Verizon Illinois introduced which demonstrates, beyond any credible doubt, that the policy NCC alleges does not exist.

Nor can the Commission grant NCC's Complaint based on the novel new claim that NCC advances for the very first time in its Initial Brief. (NCC IB, pp. 13-14). Obviously recognizing

[1] The testimonies of Verizon Illinois' witnesses Ms. Allison and Mr. Bartholomew regarding Verizon Illinois' actual interconnection practices, as corroborated by the evidence of Verizon Illinois' actual interconnections with all types of carriers at existing locations that are shared with both end users and other carrier customers, establish beyond any doubt that Verizon Illinois does not have the policy NCC claims. (*See*, VI Ex. 3.0, Allison Dir., Att. KJA-1).
[2] This is the claim as NCC specifically set it forth in NCC's Complaint. (Complaint, ¶10).
[3] The E-Mail Chain references a group of linked e-mails that were sent to NCC on December 13, 2001. (VI Ex. 1.0, McKernan Dir., Att. DMM-2).

that its stated policy claim does not bear any weight, NCC sets forth a new and much lesser claim in its Initial Brief. In particular, NCC now claims that the Commission should find Verizon Illinois liable under Section 13-514 of the Public Utilities Act ("PUA") based on what, at most, was an innocent miscommunication that may have occurred[4] despite Verizon Illinois' good faith intentions. NCC argues incorrectly that if a miscommunication occurred Verizon Illinois bears sole responsibility because Verizon Illinois allegedly cut NCC off from any contact with technical support personnel by staffing an administrative employee in the administrative account manager position. NCC's newly stated claim is incorrect as a matter of law and fact. The Commission must reject NCC's brand new claim for liability.

Initially, the Commission should not even consider NCC's newly stated claim. NCC's claims, as a matter of law, are those set forth in its Complaint. NCC did not seek to amend its Complaint during this proceeding and cannot do so now, unilaterally, during the final briefing stages of this case. Verizon Illinois would be denied due process by being prevented from presenting evidence in rebuttal to NCC's new claim. NCC is legally required to establish its claims as set forth in its Complaint. NCC must lose because it has failed to do so.

Nonetheless, if the Commission should, for some reason, entertain the lesser claim NCC now sets forth, the Commission must reject it as contrary to the evidence. The account manager position is purely administrative. Account managers work with interconnecting carriers in an administrative capacity but Verizon also assigns technical support personnel who work with the carriers in a technical capacity. It is entirely reasonable for Verizon to staff an administrative employee in the administrative account manager position and to make the employee available to work with carriers in an administrative capacity in addition to the technical support personnel

[4] Verizon Illinois notes that a miscommunication may have occurred; however, it is Verizon Illinois' belief that NCC did not misinterpret the E-Mail Chain but rather saw an opportunity to misconstrue the communication to its advantage as a litigation strategy.

who work with the carriers in a technical capacity. Further, the evidence establishes irrefutably that NCC had direct contact with both its administrative account manager and its technical support representative immediately and at all times throughout the interconnection process. NCC's assertion that it did not simply is not true. NCC's own decision to disregard both the information its technical support representative provided and its direct access to its technical support representative was unreasonable and is what led to any miscommunication that may have occurred. The law holds NCC accountable for its own negligent and unreasonable conduct.

NCC has brought and maintained a baseless lawsuit. NCC has been unable to introduce any credible evidence of either the claims set forth in its Complaint or, should the Commission for some reason consider it, its brand new claim set forth for the first time in its Initial Brief. The evidence, furthermore, demonstrates that NCC did not conduct appropriate factual investigations to assess the veracity of its claims, particularly its claim of rate-of-return fraud, prior to making them. Indeed, NCC's failure to address in its Initial Brief, even in passing, its delay claim and, with the *de minimus* exception of a single sentence, its fraud claim demonstrates unequivocally the little merit NCC itself ascribes to those claims. The Commission should hold NCC accountable for advancing such baseless claims without any evidentiary foundation or support. It is especially important that the Commission do so in this case given the particularly serious and defamatory fraud claim that NCC repeatedly and with great force sets forth. The Commission must deny NCC's Complaint, require NCC to bear Verizon Illinois' costs incurred in defending against its baseless charges as well as the Commission's costs incurred in conducting this meaningless litigation, and sanction NCC for bringing and maintaining claims for which it had absolutely no factual foundation and had conducted no factual investigation. Verizon Illinois respectfully requests that the Commission do so.

II. Argument

A. NCC's Initial Brief does not identify a Credible Evidentiary Basis for its Claims.

Falling to the significant weakness that has plagued NCC throughout this case, NCC's Initial Brief fails to present any argument in support of its claim[5] that Verizon Illinois requires carriers to wait for unnecessary "wholesale fiber build-outs" that is based on a solid, factual foundation. NCC's arguments, that are nothing more than misconstructions and unreasonable interpretations of the evidence. Such unreliable proffers of proof cannot overcome Verizon Illinois' substantial evidence which establishes, indisputably, that the policy NCC alleges simply does not exist. NCC's claim is not supported by the requisite evidence and must be rejected.

1. NCC's Statistics of alleged Occurrences of the Policy are fabricated.

NCC has been unsuccessful in identifying even a single instance when Verizon Illinois has required any carrier, including NCC, to wait for Verizon Illinois to build an unnecessary "wholesale fiber build out."[6] NCC has admitted at least ten (10) times it has no knowledge that Verizon Illinois has ever required a carrier to wait for an unnecessary "wholesale fiber build out." (Verizon Illinois Ex. 3.0, Allison Dir., Att. KJA-4; Verizon Illinois Group Exhibit 5, TL 2.08, TL 2.09, DD 1.22). Yet, in its Initial Brief, NCC asserts that Verizon Illinois has imposed the alleged policy on carriers 997 out of 1,000 times. (NCC Init. Br., p. 11).

Consistent with all of its alleged proffers of proof, NCC does so by taking evidence out of context and misconstruing it to the Commission. At hearing, NCC's counsel asked Verizon Illinois' witness Ms. Allison how many carriers had interconnected with Verizon Illinois between 1997 and mid-October 2002. Ms. Allison honestly replied that she had not obtained that number

[5] NCC's policy claim is the only one NCC's Initial Brief even addresses. NCC does not advance any arguments in regard to its claims of delay and, with the *de minimus* exception of a single sentence, fraud. NCC decision not to bother even discussing these claims is a clear indication of the little merit NCC itself ascribes to them.

[6] Verizon Illinois also was unable to identify any such instance when asked to conduct a review during discovery. (VI Ex. 3.0, Allison Dir., Att. KJA-3).

for the hearing and could not provide an accurate answer. NCC's counsel, however, would not take "I don't know" for an answer. Over Verizon Illinois' objection, he insisted that Ms. Allison speculate. Given no choice but to do so, Ms. Allison guessed that the number would likely be – "somewhere between one and a thousand." (Tr., 539-41). NCC now uses this guess, that is devoid of any factual basis, as evidence in its Initial Brief.[7]

NCC then goes even further, once again with absolutely no evidentiary foundation -- not even a guess by Ms. Allison, concluding that Verizon Illinois required the 997 hypothetical carriers, against their will, to interconnect "at dedicated facilities as opposed to shared end-user facilities." (NCC Init. Br., p. 11). NCC's assertion is entirely fabricated. It is not based in fact.[8]

Even if NCC's purported "evidence" was not made up, which it is, the fact that carriers may be interconnected on facilities dedicated to their own uses is not problematic. Interconnections are completed to fulfill the business needs of telecommunications carriers. Unlike NCC, which has not had anything other than test traffic carried over its circuits despite having been interconnected for well over a year, most interconnecting carriers have plans to and do carry substantial volumes of traffic. The carrying capacity and technological capabilities of fiber are significantly more advanced than existing copper facilities. Accordingly, it is more likely than not than interconnecting carriers will choose to have their interconnections placed on fiber facilities and to have the facilities constructed for and dedicated to their own business needs. (Ver. Ex. 3.0, Allison Dir., pp. 8, 10). NCC's fabricated evidence, based on hypothetical carriers, simply is not probative of whether any carriers were required, unwillingly, to interconnect on facilities dedicated to their own uses.

[7] In fact, NCC does so even though ALJ Showtis recognized, in ruling on Verizon Illinois' objection, that Verizon Illinois' actual number of interconnections is a matter of public record that NCC could obtain from the Commission and that Verizon Illinois would not be held to Ms. Allison's speculation. (Tr., 540).

[8] NCC's assertion cannot be based in fact because NCC did not introduce any evidence that the hypothetical carriers actually exists or that the hypothetical interconnections actually took place.

In fact, NCC's own expert witness would not even find its "evidence" probative. Mr. Dawson testified that the fact carriers may be interconnected on fiber facilities dedicated to their own use, in and of itself, is not problematic. Mr. Dawson explained that it is the delay that would result from requiring a carrier, unwillingly, to wait for a new fiber facility to be built that amounts to the alleged problem. (NCC Ex. 2.0, Dawson Dir., p. 20). Accordingly, it is undisputed that the fact carriers may be interconnected on dedicated facilities is not problematic.

2. NCC ascribes Meanings and Intents to Communications that are incorrect.

NCC maintains that the alleged policy exists even though NCC was unable to present any credible evidence of its actual existence. NCC argues incorrectly that the policy must exist because Verizon Illinois allegedly told NCC the policy existed in the E-Mail Chain and Mr. Hartmann's letter. NCC's arguments are, yet again, based on a misconstruction of evidence that NCC has taken out of context. The Commission must reject them.

a. The E-Mail Chain does not provide what NCC asserts.

NCC continues to advance an alleged interpretation of the E-Mail Chain that is both unreasonable and contrary to the evidence. NCC asserts incorrectly that Ms. McKernan told NCC that Verizon Illinois has the alleged policy because Ms. McKernan knew it to be true. NCC asserts that a long string of e-mail recipients would have told Ms. McKernan that the E-Mail Chain was incorrect if Verizon Illinois did not have the policy NCC claims. The Commission must reject with finality NCC's erroneous interpretation of the E-Mail Chain.

i. NCC's Interpretation is not reasonable.

The E-Mail Chain states explicitly that Verizon Illinois does not require a "fiber build" for interconnection, and that carriers can interconnect by leasing existing facilities. (VI Ex. 1.0, McKernan Dir., Att. DMM-2, p. 2). These statements are clear on their face, and NCC's alleged

interpretation is directly contrary to them. NCC's alleged interpretation is an unreasonable construction of the E-Mail Chain, and the Commission must reject it.

ii. Ms. McKernan did not have the Knowledge and Intent NCC ascribes.

NCC asserts that Ms. McKernan allegedly intended to tell NCC that Verizon Illinois had the policy NCC alleges because Ms. McKernan knew Verizon Illinois had the alleged policy. NCC also asserts that Ms. McKernan's experience acting as NCC's account manager in West Virginia provided her with sufficient training necessary to understand the technical issue NCC raised. These assertions, which NCC sets forth facts, are nothing more than speculative and incorrect presumptions that NCC would like to be facts.

NCC does not and cannot know what Ms. McKernan knew or intended at any time. Only Ms. McKernan knows what she knew and what she intended. NCC's assertions about Ms. McKernan's knowledge and intent are pure speculation and must be given no weight.

Ms. McKernan, being the only person with actual knowledge of what she knew and what she intended, testified directly contrary to NCC's speculation. Ms. McKernan testified that she did not understand either the issue that NCC raised by its initial e-mail inquiry or the answer that Verizon Illinois' technical support representative, Mr. Bartholomew, provided in response. (VI Ex. 1.0, McKernan Dir., pp. 8-9). Neither did she know whether Verizon Illinois had the policy NCC alleges.[9] In her administrative role of account manager, she simply performed her interface or liaison responsibility by sending NCC's inquiry to Verizon Illinois' technical support representative, Mr. Bartholomew to be answered. *(Id.,* p. 6; s*ee also*, DMM-2 (Ms. Mckernan forwarding NCC's inquiry to Verizon Illinois' technical support rather than answering the inquiry herself)). Ms. McKernan testified that in performing her liaison responsibility she only intended

[9] If Ms. McKernan knew the answer to NCC's technical inquiry, as NCC asserts, Ms. McKernan would not have sent the inquiry to Mr. Bartholomew for an answer.

to convey to NCC what Mr. Bartholomew told her in response to NCC's technical inquiry. (VI Ex. 1.0, McKernan Dir., pp. 8-9). NCC's speculation that Ms. McKernan understood the underlying issue, knew the answer herself and intended to tell NCC something other than what Mr. Bartholomew intended is contrary to the only credible evidence in the record on the issue.

Nor does the fact that Ms. McKernan worked NCC as an administrative account manager during its interconnection with Verizon Illinois' West Virginia affiliate somehow diminish her credibility. Working as an administrative account manager on a carrier's interconnection is not the type of experience through which one would gain a knowledgeable understanding of surrounding technical issues. The account manager is not involved substantive in technical issues because technical issues are addressed and handled by technical support personnel. The account manager's only involvement is in an administrative capacity. This would be true even when a dispute with regard to a technical issue arises and even if the issue is discussed in the account manager's presence. When a person's involvement is limited to administrative functions, the person cannot reasonably be expected to learn and understand the technical issues involved that are being addressed by other individuals, namely the technical support personnel. Ms. McKernan's limited involvement in NCC's West Virginia interconnection as an account manager simply would not have been an experience conducive to Ms. McKernan gaining a knowledgeable understanding of any technical issue NCC raised there.

In fact, if Ms. McKernan had some secret knowledge of Verizon Illinois' interconnection practices, which she did not, there would have been no reason for Ms. McKernan to send NCC's inquiry to Verizon Illinois' technical support for response. Ms. McKernan would have simply responded to NCC herself. Certainly, she would not have sent to NCC the entire E-Mail Chain that contains express statements in direct conflict with the secret knowledge and intent NCC

alleges Ms. McKernan to have had. Ms. McKernan would not have sent to NCC the explicit statements from Mr. Bartholomew that Verizon Illinois does not require "fiber builds" and that carriers may interconnect by leasing existing facilities.

Accordingly, the evidence disproves NCC's speculative presumptions. Ms. McKernan's knowledge and intent were not as NCC asserts. Ms. McKernan did not have any secret knowledge of an alleged policy; rather, she intended only to get an answer to NCC's technical inquiry from Verizon Illinois' technical support representative and to convey that answer to NCC. The evidence establishes that, in fact, is exactly what she did.[10]

iii. NCC knows its Assertions are not true.

It is incredibly disheartening to be faced with NCC's speculative assertions when the evidence establishes that NCC knows they are not true. NCC's President Ms. Lesser admitted under cross-examination that he knew Ms. McKernan would not handle responding to NCC's technical inquiry herself. (Tr., p. 355). Mr. Lesser knew that because Ms. McKernan specifically told him, at the very beginning of their professional relation, that she did not have technical training, knowledge or expertise. (Tr., pp. 646-47). Mr. Lesser also acknowledged that Ms. McKernan routinely sent the technical inquiries NCC raised to Verizon's technical support personnel for response. (Tr., p. 355 (stating that is "usually what she did")). For NCC to assert, despite this knowledge, that Ms. McKernan has some secret knowledge and ulterior motive to tell NCC something other than the answer she obtained from Mr. Bartholomew is highly disingenuous and only can be intended to mislead the Commission. NCC knows that its assertions are not based in fact. As explained *infra*, NCC must be sanctioned for its improper conduct in this proceeding.

[10] Ms. McKernan conveyed to NCC the entire E-Mail Chain which contains Mr. Bartholomew's answer exactly as Mr. Bartholomew provided it. (VI Ex. 1.0, McKernan Dir., p. 9, Att. DMM-2).

iv. NCC misrepresents the Facts regarding the Recipients of the E-Mail Chain.

NCC asserts, again incorrectly, that if the alleged policy does not exist then someone on the "long string of e-mail recipients" would have told Ms. McKernan that the information in the E-Mail Chain was incorrect. (NCC IB, p. 11). NCC's assertion rests, necessarily, on a presumption that the information in the E-Mail Chain was not correct; but, the information was. NCC has simply advanced an incorrect and unreasonable interpretation of the information.

The use of the phrase "retail facility" originated with Mr. Bartholomew. Mr. Bartholomew testified that he utilized the term because it most accurately represents the types of facilities he intended to describe. Namely, facilities such as DS1 primary rate interfaces ("PRIs")[11] and business dial tone lines that are used to provision retail services. (VI Ex. 2.0, Bartholomew Dir., p. 7). Mr. Bartholomew never thought, until this litigation, that the phrase would ever be interpreted to mean any facility, regardless of type, that is also used to serve end user customers. Mr. Bartholomew had never heard, over the entire course of his carrier, of facilities being separated for interconnection purposes between those that are used to serve end user customers and those that are used to serve carriers. Such a distinction never crossed his mind because it simply does not exist.[12] (*Id.*, p. 8).

Ms. McKernan's paraphrase,[13] by adding the term "enterprise" to Mr. Bartholomew's utilized "retail facilities," did not alter Mr. Bartholomew's intended answer. Enterprise is the title of Verizon's corporate division that provisions retail services such as DS1 PRIs and business dial tone lines. (Tr., p. 603). Thus, the term "enterprise" is synonymous to the "retail facilities" Mr.

[11] A DS1 PRI is a service that provides 23 data capable lines on one facility along with a main phone number.
[12] It was, however, reasonable for Mr. Bartholomew to interpret the follow-up inquiry in the E-Mail Chain as asking whether interconnection can take place on facilities, such as DS1 PRIs and business dial tone lines, that are used to provide retail services because other carriers had asked to interconnect to those types of facilities. (Tr., pp. 715-16).
[13] Ms. McKernan paraphrased by combining the terms she used in the follow-up inquiry and Mr. Bartholomew's answer. (VI Ex. 1.0, McKernan Dir., p. 9).

Bartholomew intended to describe. In fact, this is one reason Mr. Bartholomew reasonably construed the E-Mail Chain's follow-up inquiry, which used the term "enterprise," to ask whether interconnection could take place on facilities that are used to provision retail services such as DS1 PRIs and business dial tone lines.[14] (VI Ex. 2.0, Bartholomew Dir., pp. 4-8). Ms. McKernan's prefatory statement accurately repeated Mr. Bartholomew's intended answer.

Both parties agree that interconnection trunks should not be placed on facilities that are used to provision retail services. (VI Ex. 3.0, Allison Dir., p. 19; NCC Ex. 3.0, Lesser Reb. pp. 18-19; NCC Ex. 4.0, Dawson Reb., p. 7). Thus, the E-Mail Chain accurately stated Mr. Bartholomew's intended answer, and both parties agree that his intended answer is not problematic. There simply were no statements in the E-Mail Chain that needed to be corrected.

This was true from the perspective of all individuals included as recipients on the E-Mail Chain.[15] The individuals who received the E-Mail Chain are Candy Thompson, Denise Monte and Kathryn Allison. (DMM-2, p. 1). Ms. Thompson is Mr. Bartholomew's manager. The evidence establishes that she supervised Mr. Bartholomew in responding to NCC's inquiry and had his same interpretation of the utilized terminology. (VI Ex. 2.0, Bartholomew Dir., pp. 5-6). Ms. Monte works with Mr. Bartholomew in the technical support division that is responsible for the former GTE states; but, she did not participate in responding to NCC. (*See*, DMM-2). Finally, Ms. Allison was the Senior Product Manager for the former GTE states at that time. The evidence establishes that she worked with Mr. Bartholomew in preparing the response to NCC

[14] Unlike the distinction NCC alleges that Mr. Bartholomew had never heard of before, it was reasonable for Mr. Bartholomew to understand the term "enterprise" to refer to the types of facilities Mr. Bartholomew intended the term to describe, namely facilities such as DS1 PRIs and business dial tone lines that are used to provision retail services, because other carriers had inquired into the possibility of placing interconnection trunks on those types of facilities. Mr. Bartholomew understood the follow-up inquiry to be asking what these other carriers had also asked.

[15] NCC sent its originally inquiry to personnel who were responsible only for West Virginia and other former Bell Atlantic states. As those individuals would not know the answer to NCC's inquiry about Verizon Illinois, they were dropped from the distribution list when Ms. McKernan forwarded NCC's inquiry to the appropriate Verizon Illinois technical representatives. Accordingly, those individuals were not privy to the answer Verizon Illinois gave NCC.

and that she had the same understanding of the utilized terminology as Mr. Bartholomew and Ms. Thompson. (VI Ex. 2.0, Bartholomew Dir., pp. 4-6; VI Ex. 3.0, Allison Dir., pp. 16-19).

Accordingly, there was no reason for any of the Verizon Illinois' representatives who received the E-Mail Chain to tell Ms. McKernan that it needed to be corrected. The information in the E-Mail Chain was entirely accurate and did not need to be corrected. That fact is not altered by NCC's advancement of an unreasonable interpretation of the information.

v. Conclusion – The E-Mail Chain

Ms. McKernan did not have some secret knowledge of the existence of the alleged policy that she intended to convey to NCC. Her sole intent was to provide Mr. Bartholomew's answer to NCC exactly as Mr. Bartholomew provided it. It is indisputable that, by sending NCC the entire E-Mail Chain, Ms. McKernan did just that. The evidence, furthermore, establishes that the E-Mail Chain accurately conveyed Mr. Bartholomew's intended answer to NCC, and that his intended answer is in no way problematic. NCC simply advances an alleged interpretation of the E-Mail that is unreasonable because it directly conflicts with Mr. Bartholomew's express statements. The Commission must reject NCC's incorrect and unreasonable interpretation of the E-Mail Chain once and for all, and find, in accordance with the substantial evidence, that Verizon Illinois does not have the policy that NCC claims.

b. NCC misrepresents the Letter from Mr. Steven Hartmann.

NCC spends a considerable amount of time placing a distorted interpretation on a letter sent from one of Verizon's in-house attorneys, Mr. Steven Hartmann, with regard to NCC's dispute with Verizon Illinois' West Virginia affiliate. NCC misrepresents the circumstances surrounding this letter as well as the facts discussed in it. Exacerbating what has been an on-going problem throughout this case, NCC repeatedly discusses its West Virginia allegations as though the alleged events took place in Illinois and describe Verizon Illinois' actions rather than

the alleged acts of Verizon Illinois' West Virginia affiliate, which is not a party to this lawsuit and over whom the Commission does not have jurisdiction. In doing so, NCC intentionally creates confusion and misleads the Commission. The interpretation NCC attempts to place on Mr. Hartmann's letter is not accurate and must be rejected by the Commission.

i. The Circumstances surrounding the Letter are not as NCC asserts.

Despite the clarity of Mr. Bartholomew's statements (i.e., that "fiber builds" are not required), NCC has argued relentlessly and unreasonably that the E-Mail Chain states the exact opposite. It is Verizon Illinois' belief that NCC has done so because it saw in the E-Mail Chain an opportunity to advance its litigation efforts. In particular, at the time Verizon Illinois sent NCC the E-Mail Chain, NCC had an on-going disagreement with Verizon Illinois' West Virginia affiliate. NCC has attempted to coerce concessions from Verizon Illinois' West Virginia affiliate by advancing the incorrect interpretation that NCC unreasonably ascribes to the E-Mail Chain.

Verizon Illinois firmly believes this for many reasons, not all[16] but several of which are part of the record. First, the plain inconsistency of NCC's alleged interpretation with Mr. Bartholomew's express statements. At a minimum, Mr. Bartholomew's statements had to have at least raised a question for NCC as to the reasonableness of its interpretation. Yet, NCC did nothing to try to resolve any perceived ambiguity with Verizon Illinois and, in particular, Mr. Bartholomew.[17]

Second, Mr. Bartholomew offered to interconnect NCC within a fifteen (15) day period on December 18, 2001, which was only three (3) business days after Verizon Illinois provided

[16] Efforts that Verizon Illinois made to address the alleged issue through settlement at the beginning of this case are not part of the record.

[17] As explained *infra*, NCC knew Mr. Bartholomew was the technical support person who was responsible for the answer to its inquiry set forth in the E-Mail Chain and NCC had direct contact with Mr. Bartholomew yet opted not to call or e-mail him about the possibility of any allegedly perceived concern with the substance of his answer.

NCC with the E-Mail Chain. (VI Ex. 2.0, Bartholomew Dir., pp. 10-11; DMM-3). Such an offer had to totally refute any alleged belief NCC had that Verizon Illinois required carriers to wait for "wholesale fiber build outs" to be constructed for interconnection. Obviously, Verizon Illinois could not interconnect NCC in a fifteen (15) day timeframe if the construction of fiber facilities was required. Accordingly, Mr. Bartholomew's December 18, 2001, e-mail undoubtedly had to have relieved NCC of any alleged notion, which Verizon Illinois does not believe existed in the first place, that its alleged interpretation of the E-Mail Chain was correct.

Third, NCC chose not to accept Mr. Bartholomew's offer to interconnect NCC in a fifteen (15) day timeframe or, at a minimum, even to address its alleged concern based on its alleged interpretation with Mr. Bartholomew. (VI Ex. 2.0, Bartholomew Dir., p. 11). Instead, over a month after receiving Mr. Bartholomew's offer to interconnect NCC in a fifteen (15) day period, NCC chose to demand interconnection on what every carrier would agree to be unreasonable terms -- a 2 to 3 day timeframe and without even entering into an interconnection agreement. (VI Ex. 3.0, Allison Dir., Att. KJA-7; Complaint Ex. 1; *See also*, VI Init. Br., pp. 29-37 for a complete discussion of the steps NCC needed to take on its own behalf for interconnection all of which NCC demanded Verizon Illinois bypass with immediate interconnection). Verizon Illinois did not perceive NCC's demanded terms to be ones that could be complied with, nor does Verizon Illinois think that the Commission would want it to interconnect with carriers on NCC's demanded terms. Irrespective, NCC must of known this. By making such demands, NCC knew

that it would both satisfy its prerequisite for filing a Complaint[18] and ensure that its right[19] to file a complaint would be preserved,[20] thus creating a verifiable threat of litigation in Illinois.

Fourth, NCC attempted to coerce concessions against Verizon Illinois' West Virginia affiliate by threatening litigation in Illinois. NCC demanded its interconnection on unreasonable terms in Illinois through two letters, both of which provided that the letters were in accordance with Section 13-515(c) and stated NCC's intent to file a complaint in Illinois should Verizon Illinois fail to satisfy NCC's demanded terms, which NCC knew Verizon Illinois could not. NCC sent the second letter (Complaint, Ex. 1), quite notably, to Verizon's in-house counsel Mr. Hartmann just three days before NCC sent another letter to Mr. Hartmann regarding Verizon Illinois' West Virginia affiliate. (NCC Ex. T). In the latter, NCC stated demands for interconnection in West Virginia as well as "in all future circumstances and venues," thereby including all the former Bell Atlantic states, and stated its alleged problem in other jurisdictions. Making such allegations in a letter that demanded concessions in West Virginia and other former Bell Atlantic states at virtually the same time that NCC sent Mr. Hartmann its second Section 13-515(c) letter constituted a clear threat to litigate in Illinois unless Verizon conceded to NCC's stated demands in all jurisdictions. NCC knew that it did not need to spell it out, nor would NCC have wanted to given the inappropriateness of such action, the threat was clearly implied.

NCC, thus, demanded compliance with its terms in all jurisdictions before it would drop its threat of litigation in any jurisdiction, including Illinois. Verizon Illinois could have complied with NCC's demands as stated in its February 11, 2002, letter.[21] However, as Verizon Illinois

[18] Section 13-513(c) requires a prospective complainant to give the prospective respondent an opportunity to correct any alleged violation of Section 13-514 prior to filing a complaint. 220 ILCS 5/13-513(c).
[19] The term "right" is used loosely because NCC does not have a right to initiate and maintain frivolous litigation.
[20] Had NCC demanded interconnection on terms Verizon Illinois could comply with, Verizon Illinois would have agreed to NCC's demands and NCC would not have been able to proceed with litigation.
[21] NCC's demanded terms for interconnection in the letters written regarding Illinois alone (i.e., the Section 13-515(c) letters) were considerably more stringent than those NCC proffered for all jurisdictions in its February 11,

has attempted to explain throughout this litigation, the former Bell Atlantic operating companies are subject to different operating and network parameters than Verizon Illinois. (VI Ex. 3.0, Allison Dir., pp. 13-16). The issue was not so simple with respect to those states. Accordingly, Verizon could not accede to NCC's demands across all jurisdictions. But, since NCC insisted on compliance in all jurisdictions before it would drop its threat of litigation in any jurisdiction, Verizon Illinois was unable to satisfy NCC's demands by itself. NCC would not accept resolution from Verizon Illinois alone.

Indeed, the record establishes that Verizon Illinois proceeded with all possible diligence[22] to move forward with NCC's interconnection from the very beginning. Verizon Illinois offered interconnection in a fifteen (15) day timeframe over a month before it even knew of NCC's alleged concern. (DMM-3). Verizon Illinois continued to take all actions within its power to move NCC's interconnection forward. Verizon Illinois even assisted NCC by performing steps that the parties' interconnection agreement directly placed on NCC.[23] Verizon Illinois practically had to beg NCC to participate in the process. The evidence establishes that NCC breached the parties Interconnection Agreement by refusing to participate in industry routine interconnection planning meetings, (IA, §37.6.4; VI Ex. 2.0, Bartholomew Dir., pp. 26-27, Att. CB-7, CB-8), and that Verizon Illinois had to ask NCC for necessary information (*e.g.*, forecast and local contact

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2002, letter. This was by design and done with the clear motivation of ensuring that Verizon Illinois could not satisfy NCC's demands by itself. Had Verizon Illinois satisfied NCC's demands independently, NCC's threat of litigation in Illinois would have become a nullity and NCC would not have been able to utilize the threat to attempt to coerce concessions in West Virginia and the other former Bell Atlantic states. Ingeniously, NCC prevented Verizon Illinois from satisfying NCC's demanded terms in the letters NCC had to write, as a matter of law pursuant to Section 13-515(c), with regard to Illinois alone by making its stated terms very stringent in those letters. NCC then prevented Verizon Illinois from independently satisfying the terms in its February 11, 2002, letter by requiring compliance by all jurisdictions or none at all. The disparity in the terms NCC set forth in its letters addressing only Verizon Illinois as compared to its letters addressing all jurisdictions is very telling.

[22] Verizon Illinois was unable to provision NCC's interconnection any faster than it did because NCC did not fulfill the requirements NCC needed to take on its own behalf for Verizon Illinois to provision the interconnection any sooner. (VI Ex. 3.0, Allison Dir., pp. 19-42; *See also*, VI Initial Br., pp. 29-37).

[23] For example, NCC insisted that Mr. Bartholomew locate places for NCC's interconnection even though the parties' interconnection agreement clearly placed this responsibility on NCC. (DMM-6; VI Ex. 3.0, Allison Dir., pp. 31-33).

information) that the parties' Interconnection Agreement required NCC to provide repeatedly. (IA, §5, Att. 12 (Capacity Planning); VI Ex. 1.0, McKernan Dir., Att. DMM-3, DMM-5, DMM-7; VI Ex. 2.0, Bartholomew Dir., pp. 28-29, Att. CB-6, CB-8, CB-9, CB-10; VI Ex. 3.0, Allison Dir., pp. 26-31, 38-39). When NCC would engage in the process, it was often verbally abusive to Verizon Illinois' representatives.[24] Verizon Illinois' actual provisioning of NCC's interconnection exactly as NCC wanted, which Verizon Illinois would have done regardless of NCC's Complaint,[25] should have constituted a *de facto* acceptance of NCC's demands. NCC would not accept even that.

Indeed, it was impossible for Verizon Illinois to actually provision NCC's interconnection until NCC submitted its access service requests[26] ("ASRs") on July 24, 2002. (VI Ex. 3.0, Allison Dir., p. 35). NCC knew by that time that its strategy to utilize the Illinois litigation to coerce concessions in West Virginia and the other former Bell Atlantic states was not working. Nonetheless, NCC had already filed its lawsuit here and the parties had completed significant steps in the case. NCC obviously hoped, at a minimum, that it could get the Commission to require Verizon Illinois to pay for the attorney's fees it had accumulated in implementing this baseless litigation. Thus, NCC admitted it has no damages (it could not prove them or any other element of its case anyway), (NCC Ex. 3.0, Lesser Reb. p. 3), but seeks strenuously only to have the Commission award its attorneys fees.

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[24] For example, in addition to insisting that Mr. Bartholomew locate places for its interconnection, NCC demanded immediate turn around from Mr. Bartholomew, and then verbally criticized Mr. Bartholomew regarding the locations he identified even though the appropriateness of the locations for interconnection cannot be disputed as other carriers are interconnected at all of the locations today. (VI Ex. 3.0, Allison Dir., pp. 32-34; DMM-6; CB-1).

[25] NCC maintained its Complaint even after Verizon Illinois completed its interconnection exactly as it wanted under the guise that Verizon Illinois only did so because it filed its Complaint. This implication, however, is belied by the fact that Verizon Illinois offered to interconnect with NCC in a fifteen (15) day period well before Verizon Illinois even knew of NCC's alleged concern and two (2) months before NCC filed its Complaint. Verizon Illinois would have interconnected with NCC exactly as NCC wanted irrespective of its Complaint.

[26] ASR is an industry standard order form for interconnection, (Dawson Tr., p. 413-14), and the parties' Interconnection Agreement required NCC to submit one to Verizon Illinois as its official request for interconnection. (IA, §37.6.1).

This history definitively establishes, from Verizon Illinois' perspective, that NCC knew Verizon Illinois' interconnection practices were not an issue but rather saw an opportunity to impose an unreasonable interpretation on the E-Mail Chain that NCC could play to its advantage in West Virginia. NCC threatened this baseless litigation at the same time that it was demanding concessions from Verizon Illinois' West Virginia and other former Bell Atlantic affiliates. NCC structured its demands to ensure that Verizon Illinois could not alleviate NCC's threat of litigation in Illinois by satisfying NCC's demands alone. This Illinois case has been nothing but a litigation strategy for NCC. Mr. Hartmann's letter must be understood in this context.

ii. Mr. Hartmann's Statements pertained only to West Virginia.

Mr. Hartmann's letter (NCC Ex. S), while it must be viewed in the overall context described, was sent in direct response to NCC's February 11, 2001, letter. (NCC Ex. T). Although NCC clearly implied its threat to litigate in Illinois unless Verizon Illinois' West Virginia and other former Bell Atlantic affiliates conceded to NCC's demands, NCC identified the subject of its as West Virginia, explicitly stating in the letter's "regarding" line: "North County Communications, West Virginia." (NCC, Ex. T (emphasis added)). Thus, with the single exception discussed *infra*, Mr. Hartmann also limited his response to West Virginia. He prefaced his letter by stating, as the very first paragraph of the letter, as follows:

> I write in response to your letter of February 11, 2002, regarding the interconnection facility between [NCC] and Verizon West Virginia in Charleston, West Virginia.

(NCC, Ex. S (emphasis added)). Mr. Hartmann clearly intended the matters he discussed to pertain solely to West Virginia.

Indeed, the events and actions that Hartmann discussed pertained directly and solely to events that had taken place with regard to West Virginia. The "special exception" and

"courtesy" NCC touts throughout its Initial Brief has nothing to do with Verizon Illinois. Mr. Hartmann made those statements because NCC had been given a "special exception" and "courtesy" in West Virginia and then, in its February 11, 2002, letter, stated that it was breaching its underlying agreement with Verizon Illinois' West Virginia affiliate that had been the reason for the "special exception" and "courtesy."[27] The physical network constraints faced by Verizon Illinois' West Virginia and other former Bell Atlantic affiliates simply are not the same as Verizon Illinois faces. Mr. Hartmann's statements simply did not describe network operations in Illinois. His statements must not be taken out of the context in which they were made (i.e., West Virginia) and unreasonably construed to address Illinois when they did not.

iii. Mr. Hartmann's Reference to Illinois does not have the Significance NCC ascribes.

Mr. Hartmann did make a single, passing reference to Illinois. Mr. Hartmann did so because of NCC's threat to litigate in Illinois if Verizon Illinois' West Virginia and other Bell Atlantic affiliates did not make the concessions NCC demanded. NCC did not mention Illinois by name in its February 11, 2002, letter; but, NCC did reference its alleged problem in another jurisdiction in its February 11, 2002, letter. And NCC did send to Mr. Hartmann, just three business days before, its second Section 13-515(c) letter wherein NCC expressly threatened litigation in Illinois. NCC, thus, clearly stated its threat to litigate in Illinois if Verizon Illinois' West Virginia and other former Bell Atlantic affiliates did not give it the concessions it demanded. Mr. Hartmann could not accede to NCC's coercion.[28]

[27] Notably, the West Virginia Public Service Commission ("WV PSC") held that NCC had to fulfill the agreement with Verizon Illinois' West Virginia affiliate that NCC had breached via its February 11, 2002, letter. Final Order, WV PSC, Docket No. 02-0254-T-C.

[28] Even if Mr. Hartmann had wanted to give in to such improper tactics in order to avoid NCC filing a lawsuit in Illinois, it was impossible for him to do so given the physical network constraints in the former Bell Atlantic states.

He did, however, try to separate NCC's threat to litigate in Illinois from the on-going disagreement in West Virginia. Mr. Hartmann made a single statement that responded to NCC's improper tactic of coercion. He stated as follows:

> If NCC wants to litigate and/or arbitrate in Illinois or some other jurisdiction over what the 'appropriate protocol' for interconnection should be, it should tee up the issue in ***that*** jurisdiction, ***not*** hold Verizon's network in West Virginia hostage in an attempt to extort concessions….

(NCC Ex. S, p. 2 (emphasis in original)).[29] It was entirely appropriate for Mr. Hartmann to instruct NCC to address any alleged Illinois problem in Illinois and to stop using a threat to litigation in Illinois as a coercion tactic in West Virginia.

Mr. Hartmann's response is also notable in that it obviously separates Illinois from the on-going West Virginia dispute on the basis of state. By his statement, it is clear that Mr. Hartmann did not believe that any alleged Verizon Illinois problem could be addressed in the same context as the West Virginia dispute. The two companies are subject to different operating parameters. The issues simply are not the same.

3. Conclusion – NCC's Policy Claim as stated in NCC's Complaint.

NCC's arguments, based on unjustified interpretations and misrepresentations of the evidence, simply are not compelling or reliable. They cannot overcome the substantial evidence Verizon Illinois has presented that demonstrates the policy NCC alleges simply does not exist. NCC has failed to satisfy its burden of proof, and the Commission must deny its claim.

B. The Commission must reject NCC's New Policy Claim.

Obviously recognizing the significant infirmities in its policy claim (namely, the complete lack of any evidentiary support), NCC makes a brand new and much lesser claim in its

[29] The opening statement to NCC's Initial Brief and one that NCC repeats throughout its Initial Brief (i.e., "If you don't like it, go sue us"), which NCC attributes to Mr. Hartmann, was never made by Mr. Hartmann. (*See*, NCC Ex. S). Mr. Hartmann exact statement is as set forth here by Verizon Illinois. NCC made it the quote that it repeatedly ascribes to Mr. Hartmann. This is *yet another example of NCC fabricating evidence* and attempting to mislead the Commission from the truth.

Initial Brief. (NCC IB, pp. 13-14). NCC proclaims that it does not matter whether Verizon Illinois has the policy NCC alleged in its Complaint. NCC argues incorrectly, rather, that the Commission can and should hold Verizon Illinois liable under Section 13-514 for allegedly cutting NCC off from any contact with technical support personnel by staffing an administrative employee in the account manager position. The Commission must reject NCC's last-minute attempt to find some alternative claim, albeit an extremely weak one, to save its case.

1. NCC cannot amend its Complaint in its Initial Brief.

NCC obviously has decided that the evidence does not support the policy claim set forth in its Complaint. NCC could have filed a motion to amend its Complaint but did not. NCC, rather, does so unilaterally now, during the briefing stage, thereby preventing Verizon Illinois an opportunity to introduce evidence in direct response to NCC's new claim and denying Verizon Illinois due process. As a matter of law, NCC is required to prove its claims as set forth in its Complaint. If NCC does not satisfy its burden of proof with respect to its claims as stated in its Complaint, which it has not, then NCC must lose.

2. The Evidence does not support NCC's New Claim.

It was not unreasonable for Verizon Illinois to staff an administrative employee in the administrative account manager position. NCC's factual assertion that Ms. McKernan acted as a "gatekeeper" and prevented NCC from working with technical support personnel is incorrect and, yet again, disproved by the evidence. The evidence establishes, beyond any doubt, that NCC had direct access to a technical support representative, Mr. Bartholomew, from the very beginning and at all times throughout the interconnection process. Should the Commission, for

some reason, entertain NCC's newly stated claim, which it should not, the Commission must find against NCC on the basis of the evidentiary record.[30]

a. The Account Manager is an Administrative Position.

The position of account manager was created in direct response to a request by the carrier community itself. (Tr., pp. 589-91). The position is intended to work with interconnecting carriers in an administrative capacity, including as an administrative interface. (VI Ex. 1.0, McKernan Dir., pp. 2-3). In fact, the specific request from the carrier community was for an administrative interface or liaison. (Tr., pp. 589-91). The position makes the interconnection process more efficient by locating for the interconnecting carriers the Verizon technical support personnel responsible for handling interconnections and addressing technical issues across the various states.[31] (Tr., p. 591). The account manager also performs other administrative functions, such as gathering needed information, organizing planning meetings and, overall, participating in the process to ensure that all administrative needs that arise are handled timely and efficiently. In order to perform their administrative duties, account managers are instructed as to the routine steps in the interconnection process[32] and the standard types of information to be obtained.[33]

[30] Even though Verizon Illinois was not provided an opportunity to present evidence in direct rebuttal to NCC's newly stated claim, the record does contain evidence that refutes NCC's claim.

[31] Subject matter experts generally differ from state to state, especially as between the former GTE and Bell Atlantic operating territories, and the carriers wanted a single administrative point of contact into the Verizon network. (VI Ex. 1.0, McKernan Dir., pp. 2-3).

[32] For example, Ms. McKernan was instructed and knew that the first step in the interconnection process is for the interconnecting carrier to enter into an interconnection agreement with the respective Verizon local exchange carrier ("LEC.") She researched whether NCC had done so with Verizon Illinois and immediately encouraged NCC to do so upon determining that NCC had not. (DMM-2, p. 3). NCC's expert witness agreed that entering into an interconnection agreement is the very first step in the interconnection process. (Dawson, Tr., p. 403).

[33] For example, it is industry standard for interconnecting carriers to provide forecast information so that the LECs can maintain the reliability of the network. (Dawson, Tr., 409-10; VI Ex. 3.0, Allison Dir., pp. 26-27; VI Ex. 5.0, VZ-NCC 4.27). Account managers would not know what all the relevant forecast information is or how technical support personnel utilize the information, but account managers are provided with a forecast template to ensure that all relevant forecast information is gathered and available for the technical support personnel. (*See*, DMM-5 (Ms.

b. The Account Manager is not a "Gatekeeper."

Interconnecting carriers work directly with technical support personnel in addition to administrative account managers. Technical support personnel are assigned immediately and have responsibility for working with carriers on all technical issues. (Tr., 593). NCC's expert witness Mr. Douglas agreed that it is normal course for carriers to work directly and independently with technical support personnel throughout the interconnection process. (Tr., 409-10 (testifying that technical personnel routinely work with carriers through interconnection planning meetings)). Thus, both administrative and technical employees are assigned immediately and work with the interconnecting carriers simultaneously to address the spectrum of needs and issues that can arise.

Accordingly, the account manager is not the only employee that an interconnecting carrier can talk to and work with, and the account manager is not the employee that a carrier works with on addressing technical issues. The account manager is simply the employee that carriers work with regarding administrative matters. The technical support representative is the employee that carriers talk to and work with regarding technical issues. The account manager does not prevent the carriers from speaking with their technical support representatives, nor could an account manager possibly do so. The account manager simply is not a "gatekeeper."

c. NCC was not "cut-off" from Technical Support.

The evidence establishes indisputably that both Ms. McKernan and Mr. Bartholomew played their respective, intended roles with NCC. Upon receiving NCC's initial inquiry for Illinois, Ms. McKernan did not answer it herself. Rather, she immediately identified the appropriate technical support personnel responsible for Illinois to assist NCC and respond to its

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McKernan informing NCC that the forecast template is on the Verizon web-site); DMM-7 (Ms. McKernan again asking NCC to complete the "forecast template")).

inquiry.[34] (DMM-2, p. 3). Mr. Bartholomew responded, accurately, to NCC's inquiry. (DMM-2, pp. 1-3). Mr. Bartholomew, furthermore, continued to fulfill his responsibility to work with NCC throughout the interconnection process in a technical capacity. The course of e-mails exchanged between the parties, and between Mr. Bartholomew and Mr. Lesser, in particular, demonstrate indisputably that Mr. Bartholomew worked directly with NCC and, in fact, as NCC's primary contact in provisioning its interconnection with Verizon Illinois from the very beginning of the process until the very end. (*See generally*, all exhibits to Ms. McKernan's and Mr. Bartholomew's testimonies).

Mr. Bartholomew never hid who he was or the role he was playing in working with NCC on its interconnection. Just the opposite, Mr. Bartholomew prominently held himself out, at all times, as NCC's technical support representative. Beginning with the E-Mail Chain, which took place at the very start of NCC's relationship with Verizon Illinois, Mr. Bartholomew clearly identified himself as Technical Support, and provided his direct telephone number and e-mail address in every exchange. In fact, Mr. Bartholomew did so *twice* in the E-Mail Chain. (DMM-2, pp. 1, 2). Mr. Bartholomew also did so in his December 18, 2001, e-mail to Mr. Lesser, which took place only three (3) business days after the E-Mail Chain, as well as in every single communication thereafter. (DMM-3). The documented e-mails between the parties are dispositive of any issue as to whether NCC had direct and immediate access to technical support.

The fact that Ms. McKernan acted as an interface between NCC and Mr. Bartholomew in the E-Mail Chain does not and cannot change the conclusion that NCC had direct and immediate access to Mr. Bartholomew. Ms. McKernan simply participated in the E-Mail Chain in her role

[34] NCC had sent its inquiry to an entirely wrong group of people. In particular, NCC had sent its inquiry to personnel responsible for West Virginia and other former Bell Atlantic states. Ms. McKernan immediately identified the correct personnel who are responsible for technical issues in Illinois and other former GTE states. (*See generally*, DMM-2).

as a liaison. Her acts of paraphrasing Mr. Bartholomew's answer and stating a follow-up inquiry within the E-Mail Chain in no way impeded NCC's direct contact with Mr. Bartholomew or receipt of all the information that Mr. Bartholomew provided in response to its inquiry.[35] Ms. McKernan sent to NCC the entire E-Mail Chain and, thus, Mr. Bartholomew's answers to the inquiries exactly as Mr. Bartholomew had provided them. NCC was given Mr. Bartholomew's explicit statements that Verizon Illinois does not require "fiber builds" and that carriers may interconnect by leasing existing facilities. In addition, NCC had Mr. Bartholomew's e-mail dated December 18, 2001, offering to interconnect NCC within a fifteen (15) day timeframe. NCC also had Mr. Bartholomew's prominent and repeated identification of himself as technical support, and his direct telephone number and e-mail address. NCC simply chose to disregard Mr. Bartholomew and the information that he provided.

d. It is reasonable to staff an Administrative Employee in an Administrative Position.

The account manager position, as the position was defined and shaped to meet the specific request of the carrier community, is an administrative position. It is entirely reasonable to staff an employee with an administrative background and experience in the position. A second employee with a technical background and experience was available at all times to (and, in fact, did) work with NCC in a technical capacity. It is reasonable and appropriate to provide carriers with the administrative assistance they requested in conjunction and addition to the technical support assistance that is simultaneously provided.

[35] NCC asked what it has admitted was a vague and ambiguous question, (Tr., pp. 349-50), to a person that it knew was only an administrative employee, (Tr., pp. 355, 646-47) and whom it knew would relay the question to another person to be answered. (Tr., p. 355). NCC criticizes Ms. McKernan for describing the possibility of a miscommunication that may have resulted from what NCC itself set in motion as "playing telephone." NCC implies that Ms. McKernan treats carriers' interconnections as a game, but it was clear from Ms. McKernan's demeanor at the hearing that she takes her job seriously. Ms. McKernan's description, while it may appear unsophisticated to NCC, is a very good and realistic description of the end result that should be expected any time a vague and ambiguous question is asked, especially when it is posed to an administrative intermediary who is expected to relay the question to another person for response, as NCC has admitted was the case with its inquiry.

The account manager should not be, and was not intended by the carrier community to be, a duplicate of the technical support personnel who already worked on the carriers' interconnections. In fact, it would be impossible to adequately train administrative employees for appropriate response to the whole host of technical issues that can arise. For example, Mr. Bartholomew has had over twenty (20) years of technical experience and has received numerous technical certifications from expert industry leaders. (VI Ex. 2.0, Bartholomew Dir., p. 2; Tr., p. 718). Verizon fulfills the need for technical assistance by providing immediate and direct access to technical support personnel who, like Mr. Bartholomew, have extensive training in the requisite areas. Account Managers are not intended to and do not fulfill these technical functions. Once again, it is reasonable to staff an administrative employee with administrative training and expertise to perform the account manager's administrative responsibilities.

This conclusion would not change even if NCC misinterpreted Ms. McKernan's prefatory statement to the E-Mail Chain as it alleges, which Verizon Illinois' submits it did not. Ms. McKernan provided NCC the entire E-Mail Chain. (VI Ex. 1.0, McKernan Dir., p. 9, Att. DMM-2). Ms. McKernan, thus, provided NCC with Mr. Bartholomew's answer exactly as Mr. Bartholomew provided it. NCC had the exact information that was the source for Ms. McKernan's prefatory statement, including Mr. Bartholomew's statements that Verizon Illinois does not require "fiber builds" and that carriers may interconnect by leasing existing facilities. NCC was able to review all of this information immediately. Accordingly, NCC had all of the information necessary to make an accurate, informed and reasonable interpretation of the E-Mail Chain. Had NCC given the information its due consideration, NCC would have been relieved instantly of any notion that Verizon Illinois requires unnecessary "wholesale fiber build outs." Ms. McKernan's acts of adding a single, prefatory statement with the notation "as you can see

below" and forwarding the E-Mail Chain to NCC in no way prevented, nor could it possibly have prevented, NCC from considering Mr. Bartholomew's statements.

Nor would the conclusion that it is reasonable to staff an administrative employee in an administrative position change if Ms. McKernan was confused by the technical information in the E-Mail Chain, which she admittedly was. NCC's President Mr. Lesser, who was NCC's representative that reviewed the E-Mail Chain, holds himself out as an expert in the field of telecommunications and on issues of interconnection specifically. (*See*, NCC Opposition to VI's Motion to Strike, p. 8 (Oct. 24, 2003)). He advanced testimony in this case on a whole host of technical issues. It simply would not be reasonable for Mr. Lesser to have the same confusion as an administrative employee.

Indeed, interconnecting carriers have a duty to act reasonably during the interconnection process too. Under any standard of reasonableness interconnecting carriers must have a duty to have their own, qualified technical personnel review all technical information and participate in addressing all technical issues encountered during the interconnection process. A reasonably prudent person operating a telecommunications company simply would not rely on technical information without having a qualified expert review the material, and most certainly would not rely without question on an isolated statement of an administrative employee in interpreting any technical information. This is especially so when the carrier is provided with all of the technical information, as NCC was. If NCC suffered from the same confusion as Ms. McKernan, which Verizon Illinois does not believe for a minute that it did, then NCC did not fulfill its own responsibility to have the information Verizon Illinois provided reviewed by a qualified technical expert. An appropriately qualified technical expert would never have interpreted the E-Mail Chain to state that "unnecessary wholesale fiber build outs" are required when Mr. Bartholomew

specifically stated that "fiber builds" are not required and that carriers may interconnect by leasing existing facilities. Accordingly, even if Ms. McKernan was confused by the information in the E-Mail Chain, which she was, it would not be reasonable for NCC to have the same confusion. It would in no way alter the conclusion that it is appropriate to staff an administrative employee in an administrative position.

e. NCC wants to isolate Ms. McKernan's Statement.

NCC was provided all the information and obviously had every opportunity to arrive at the correct and only reasonable interpretation of the E-Mail Chain (i.e., that unnecessary "wholesale fiber build outs" are not required). Any reasonably prudent carrier would have read and considered the entire E-Mail Chain and NCC had a duty to do so. The conflict between Mr. Bartholomew's express statements in the E-Mail Chain and NCC's alleged interpretation of Ms. McKernan's prefatory statement is glaring. NCC knows that the only way for the Commission to avoid this glaring inconsistency is to consider Ms. McKernan's prefatory statement in isolation. NCC's argument that Verizon placed an administrative employee in the alleged position of a gatekeeper is NCC's creative way of getting the Commission to do so.

The evidence, however, establishes irrefutably that Ms. McKernan was not a "gatekeeper" and that NCC had direct and immediate access to both Mr. Bartholomew as well as all the information necessary, had NCC considered it, to relieve NCC immediately of any alleged notion that Verizon Illinois requires carriers to wait for "unnecessary wholesale fiber build outs." Ms. McKernan did not prevent, nor could she have prevented, NCC from reading and considering Mr. Bartholomew's statements in the E-Mail Chain or Mr. Bartholomew's e-mail, sent on December 18, 2001, offering to interconnect NCC in a fifteen (15) day period. Ms. McKernan did not prevent, nor could she have prevented, NCC from using Mr. Bartholomew's contact information, which both Ms. McKernan and Mr. Bartholomew provided NCC, to call or

e-mail Mr. Bartholomew. NCC's assertion, that Ms. McKernan is a "gatekeeper" who did constrain NCC in this fashion, is made with the obvious motivation of misleading the Commission to disregard the evidence that refutes NCC's alleged and unreasonable interpretation of the E-Mail Chain. NCC's assertion must be rejected.

f. NCC must be held to a Standard of Reasonableness.

NCC asserts that if a miscommunication occurred "sole fault lies with Verizon [Illinois]." (NCC IB, p. 8). This assertion is contrary to the applicable principles of law. The standard of reasonableness applies to both parties. Verizon Illinois is not strictly liable for the results of NCC's unreasonable conduct. NCC's assertion that Verizon Illinois is constitutes a blatant misleading of the Commission on this important area of the law. NCC must be held responsible if the Commission finds, as it should, that NCC's own actions caused any miscommunication.

g. Conclusion - NCC's Amended Claim.

Verizon created the account manager position because the carrier community wanted and asked for it. The problem NCC alleges did not arise out of the fact that Verizon provides carriers with the benefits of having administrative assistance in addition to technical support. Both Ms. McKernan and Mr. Bartholomew acted reasonably and in accordance with their job descriptions. The problem NCC alleges arose because NCC, a single carrier, unreasonably disregarded information provided to it -- information that would have relieved it instantly of any notion that Verizon Illinois required carriers to wait for unnecessary "wholesale fiber build outs" -- and then unreasonably refused to either call or e-mail its technical support representative to discuss any alleged concern. Account managers perform vital and important administrative functions. The position should not be called into question simply because of the unreasonable and unjustified complaints of a single carrier. NCC must be held accountable for its own unreasonable conduct.

C. The West Virginia Decision must be considered.

NCC makes a remarkable change in the arguments it has been advancing throughout this case. NCC has introduced volumes of allegations against Verizon Illinois' West Virginia affiliate, (*see*, VI Mot. to Strike, pp. 6-9 (identifying all of NCC's non-jurisdictional allegations)), yet now argues that the Commission should not consider the West Virginia Public Service Commission's ("WV PSC's") decision that rules on the merits of those allegations. (NCC IB, pp. 14-15). NCC's clearly biased and self-serving position must be rejected.

The reason for NCC's sudden change in position is clear. The WV PSC ruled against NCC. NCC made the exact same policy claim and introduced virtually the exact same evidence in support of its claim in West Virginia as it has here. Most notably, NCC introduced the volumes of allegations against Verizon Illinois' West Virginia affiliate that it has here as well as the expert testimony of Mr. Douglas Dawson that is almost identical to Mr. Dawson's testimony here.[36] NCC introduced and questioned Ms. McKernan about the E-Mail Chain.[37] Based on this virtually identical proffer of proof from NCC, the WV PSC found the evidence insufficient to establish NCC's policy claim.

Verizon Illinois agrees that the Commission cannot hold Verizon Illinois liable for any acts that its affiliates in other jurisdictions may have taken. This is the very reason that Verizon

[36] Indeed, NCC's expert witness appears to have submitted his West Virginia testimony in Illinois virtually verbatim. Verizon Illinois' witness Ms. Allison had to point out portions of his testimony that addressed claims pending in West Virginia that are not even before this Commission. NCC's witness had apparently missed deleting his discussions of those claims from his West Virginia testimony when he cut-and-pasted it for submission in Illinois. Upon Ms. Allison pointing this out, (VI Ex. 3.0, Allison Dir., pp. 48-49), he agreed that those portions of his testimony had no place in Illinois. (NCC Ex. 4.0, Lesser Reb., p. 10).

[37] NCC criticizes Ms. McKernan in its Initial Brief for not testifying about the possibility of a misunderstanding in West Virginia. (NCC IB, p. 13). Ms. McKernan, however, attempted to testify regarding that possibility, but NCC's counsel, Mr. Dicks, strenuously objected and prevented her from doing so. It is incredible that NCC now, through the same counsel, criticizes Ms. McKernan for not presenting this testimony. And, yet again, the fact that NCC does so is another clear example of its manipulation and misconstruction of the evidence, all designed and with the motive to mislead the Commission, in this instance about the credibility of Ms. McKernan. Irrespective, it is important to note that the WV PSC did not even have before it evidence of the possibility of a miscommunication and yet it still rejected, outright, NCC's claim of an alleged policy in that state.

Illinois sought to exclude the volumes of allegations NCC introduced against Verizon Illinois' affiliates in this case. It is Verizon Illinois' position that the Commission does not have the authority to consider such non-jurisdictional allegations, made against entities that are not even parties to this case, as any part of the basis for its decision with respect to Verizon Illinois in this case. (*See*, VI Mot. to Strike, pp. 2-6).

However, NCC succeeded, over Verizon Illinois' objections, to introduce its volumes of allegations against Verizon Illinois' West Virginia affiliate.[38] The record is wholly one-sided on these issues, containing only NCC's unsubstantiated allegations. The Commission did not hear evidence from Verizon Illinois in response to NCC's non-jurisdictional allegations, nor could the Commission have taken evidence on such matters because they are beyond the scope of its jurisdiction. But, given the fact that NCC has contaminated the record by introducing all of its allegations against Verizon Illinois' West Virginia affiliate, the Commission must consider the WV PSC's final decision because it rules on the merits of those allegations. The Commission must recognize that the WV PSC found NCC's allegations against Verizon Illinois' West Virginia affiliate along with the E-Mail Chain and the virtually verbatim testimony of NCC's expert witness to be inadequate to support the very policy claim NCC sets forth here.

D. NCC is not entitled to Attorney's Fees but Verizon Illinois is.

NCC has dropped all of its requests for relief except one – attorney's fees. NCC obviously recognizes that it did not have any evidentiary basis to support any of its other claims for relief --

- Verizon Illinois has already interconnected with NCC and did so as soon as it possibly could;

[38] NCC also introduced allegations against Verizon Illinois' New York and Maryland affiliates, but those allegations, for the obvious reason that they do not pertain to Verizon Illinois' West Virginia affiliate, are not addressed by the WV PSC's decision.

- Verizon Illinois does not have a policy from which the Commission can order Verizon Illinois to cease and desist;
- Verizon Illinois has not committed a second (or any) violation of Section 13-514 for which the Commission could award penalties; and
- none of Verizon Illinois' actions, all of which have been diligent and reasonable, have damaged NCC in any way whatsoever.

NCC's failure to address any of these requests for relief in its Initial Brief as well as its repeated assertions that it is not seeking any damages, (NCC Ex. 3.0, Lesser Reb., p. 3), could not constitute clearer acknowledgements of the lack of foundation for any of NCC's original requests for relief.

Nonetheless, NCC does maintain that it is entitled to the attorney's fees it has incurred by bringing and maintaining this baseless litigation. (NCC IB, pp. 15-16). NCC seeks the Commission's sympathy by comparing this litigation to "David and Goliath." NCC further argues that through this litigation it has somehow stopped what it alleges to be Verizon Illinois' pervasive delay tactics and saved Illinois citizens from being defrauded of millions. NCC makes these claims despite its complete inability to introduce any reliable evidence in support of any of its claims, most importantly its claim of rate-of-return fraud, and the fact that not a single carrier, with the sole exception of NCC itself, has ever complained of Verizon Illinois' interconnection practices.[39] NCC's arguments for the recovery of its attorney's fees are as baseless as the claims it has made.

The truth of the matter is that NCC has accomplished nothing of merit with this litigation. NCC has not uncovered any evidence that Verizon Illinois purposefully delays carriers, requires carriers to wait for the construction of "unnecessary wholesale fiber build outs" or commits rate-of-return fraud. Verizon Illinois did not have the policy NCC claims or commit rate-of-return

[39] Certainly, if the alleged delay tactics existed, which they do not, and were pervasive as NCC claim, then at least one other carrier would have complained about them.

fraud before NCC filed its complaint, and Verizon Illinois will not have the policy or commit rate-of-return fraud after. The sole effect of this litigation has been to force Verizon Illinois and the Commission to expend incredible amounts of time, resources and money responding to and hearing NCC's baseless charges, respectively. Verizon Illinois certainly finds it quite unfortunate that NCC has insisted on bringing and maintaining this litigation when Verizon Illinois specifically told NCC that "fiber builds" are not required and offered to interconnect NCC within a fifteen (15) day timeframe on December 18, 2001. (DMM-2; DMM-3). And Verizon Illinois finds it quite unfortunate that NCC refuses to allow itself to be relieved of the alleged notion that Verizon Illinois requires carriers to wait for unnecessary "wholesale fiber build outs" despite the overwhelming evidence to the contrary. There simply was no need for this litigation.

It would be entirely unfair to require Verizon Illinois to pay NCC its attorney's fees in bringing and maintaining this baseless litigation. If the Commission does so it will be encouraging NCC to file and take its chances more baseless lawsuits in the future under the notion that the outcome will not hurt it, even if it loses, because the other side will pay its attorney's fees. NCC should be taught that it cannot file and maintain lawsuits that are not well grounded in law and fact. NCC should learn from having to bear its own litigation costs that it must conduct factual investigations and verify the truth of its litigation claims, especially those founded in fraud,[40] or not make them at all. NCC should be taught that it cannot utilize threats of litigation as a means of coercing concessions. Next time, maybe NCC will consider the facts before running to the courthouse. This country has a big enough problem with the volumes of

[40] NCC's President Mr. Lesser admitted at hearing that NCC did not conduct an investigation or any type of study, analysis or review to determine whether any facts support its fraud claim, that NCC did not even know when or how the Commission had ruled on Verizon Illinois' rate base and that Mr. Lesser was not even competent to testify on the subject of rate-of-return regulation. (Tr., pp. 312-13, 317-19; *see also*, VI IB, pp. 27-29 (discussing NCC's failure to identify any foundation for its fraud claim)).

baseless lawsuits filed on a daily basis to encourage the conduct by awarding plaintiffs who do with their attorney's fees.

Irrespective, even if the Commission wanted to award NCC its attorney's fees, which it should not, the Commission does not have the authority to do so. The Commission is a creature of statute, and cannot exceed its statutorily granted authority. Section 13-516(a)(3) prohibits the Commission from awarding attorneys fees in cases brought under Section 13-515 unless the complainant has demonstrated, *by a preponderance of the evidence*, that it has been subjected to a violation of Section 13-514. 220 ILCS 5/13-516(a)(3). The Commission has no authority to grant NCC the recovery of its attorney's fees because NCC has completely failed to make such a demonstration.

On the other hand, the Commission does have the authority to and should grant Verizon Illinois its attorney's fees. In Illinois, defendants are entitled to recover attorney's fees (should they prevail on the merits) in all cases where plaintiffs are entitled to recover fees (should they prevail on the merits). 735 ILCS 5/5-109. Verizon Illinois, therefore, is entitled to recover its attorney's fees from NCC because the merits are in favor of Verizon Illinois. Verizon Illinois has been the victim of a baseless lawsuit and has been forced to expend substantial resources defending itself from NCC's foundationless claims. It would be entirely inequitable to require Verizon Illinois to bear the costs that NCC has forced it to incur by NCC's unreasonable maintenance of this baseless lawsuit. The Commission should enforce its authority to award Verizon Illinois its attorney's fees in order to teach NCC the lesson that complaints filed with the ICC must be well grounded in law and fact, and that complainants must conduct appropriate factual investigations into the allegations they set forth. Otherwise, the Commission will run the

risk of becoming yet another forum where complainants take their chances on baseless lawsuits under NCC's notion that the outcome will not effect them even if they lose.

E. NCC should be sanctioned.

The Commission is required to impose appropriate sanctions on parties that bring and maintain complaints under Section 13-515 that are not "well grounded in law and fact" and that assert "allegations or other factual contentions" that do not have evidentiary support. 220 ILCS 5/13-515(i), (j)(providing that the Commission shall impose sanctions). The Commission must comply with its statutory mandate.

Verizon Illinois has demonstrated herein and in its Initial Brief that NCC's claims are not well grounded in law and fact and that NCC's factual allegations do not have evidentiary support. NCC brought and has maintained this Complaint when NCC was told, upon its very first contact with Verizon Illinois, that "fiber builds" are not required and that parties can interconnect by leasing existing facilities. (DMM-2). NCC brought and maintained this litigation when it was told on December 18, 2001, that Verizon Illinois would complete its interconnection in a fifteen (15) day timeframe. (DMM-3). NCC was provided evidence of the fact that Verizon Illinois has interconnected with all types of carriers at existing facilities that are also used to provide service to end users as well as other carrier customers. (KJA-1). NCC was unable to uncover even a single instance when Verizon Illinois has refused to do so. (Verizon Illinois Ex. 3.0, Allison Dir., Att. KJA-4; Verizon Illinois Group Exhibit 5, TL 2.08, TL 2.09, DD 1.22). NCC has presented nothing in support of its claims but speculation, misrepresentations and fabricated evidence.

In fact, the record is clear that NCC conducted absolutely no factual investigation into the veracity of its most serious and troubling claim -- that Verizon Illinois has committed rate-of-return fraud against the citizens of Illinois. (*See supra*, p. 35 fn. 39). NCC repeatedly and

strenuously advanced the claim, yet presented only a scant eight (8) lines of testimony, (NCC Ex. 3.0, Lesser Reb., pp. 4-5), that amounted to nothing more than pure hypothetical speculation, (Lesser Tr., p. 312-13 (admitting that NCC's fraud claim amounts to nothing more than a hypothetical theory)), from a witness who, by his own admission, is not qualified to testify or render an opinion on the subject matter. (Lesser Tr., p. 312). NCC's maintenance of its baseless fraud claim -- a particularly serious and defamatory charge -- is the most troubling of all. The Commission must not permit carriers to bring and maintain lawsuits through which such slanderous charges are made, with absolutely no factual basis, without penalty.

The General Assembly has mandated that the Commission sanction complainant under the circumstances presented here. It would be hard to find a clearer case of a baseless lawsuit. The Commission must sanction NCC in accordance with Section 13-515(i), (j) of the PUA.

III. Conclusion

WHEREFORE, for each and everyone of the foregoing reasons, Verizon Illinois respectfully requests that the Commission find against NCC; deny NCC's requests for relief; assess NCC Verizon Illinois' attorneys fees as well as all of the Commission's costs incurred in conducting this proceeding; sanction NCC for maintaining a baseless lawsuit and advancing allegations that are not well grounded in law or fact and that are made without conducting any investigation as to their merits; and grant Verizon Illinois any and all other appropriate relief.

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Respectfully submitted,

Verizon North Inc. and
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By:_____
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CERTIFICATE OF SERVICE

I, Sarah A. Naumer, hereby certify that I served copies of the Reply Brief of Verizon North Inc. and Verizon South Inc. to the service list in Docket No. 02-0147 by email on January 20, 2004.

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